



State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES
6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095
(603) 271-3503 FAX (603) 271-2867



Paul Kimball
d/b/a Kimball Lumber Company LTD
PO Box 725
Wolfeboro, NH 03894

Re: Filter Bed Road, Wolfeboro, NH

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
AND HEARING
No. AF 01-036**

May 16, 2001

I. Introduction

This Notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Water Division (the Division) to Mr. Paul Kimball d/b/a Kimball Lumber Company LTD, pursuant to RSA 482-A and Env-C 614. The Division is proposing that fines totaling \$2,000 be imposed against Mr. Paul Kimball d/b/a Kimball Lumber Company LTD for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

II. Parties

1. The Department of Environmental Services, Water Division, is an administrative agency of the State of New Hampshire, having its principal office at 6 Hazen Drive, Concord, NH.
2. Mr. Paul Kimball d/b/a Kimball Lumber Company LTD is an individual having a mailing address of PO Box 725, Wolfeboro, NH 03894-0725.

III. Summary of Facts and Law Supporting Claims

1. RSA 482-A authorizes DES to regulate dredging, filling, and construction in surface waters of the state, shorelines of surface waters, and in wetlands. RSA 482-A:11, I authorizes DES to adopt rules to implement the wetlands law. Pursuant to this authority, DES has adopted NH Admin. Rules Wt 100-700.
2. RSA 482-A:13 authorizes the Commissioner of DES to impose administrative fines of up to \$2,000 per offense for violations of RSA 482-A, rules adopted under RSA 482-A, and permits issued under RSA 482-A. Pursuant to RSA 482-A:13, the Commissioner has adopted Env-C 614 to establish a schedule of fines for violations of RSA 482-A, rules adopted under RSA 482-A, and permits issued under RSA 482-A.
3. On September 29, 2000 DES issued Administrative Order WD 00-63 to Paul Kimball, ordering him to:

- a. Immediately cease and desist all work in and adjacent to wetlands on the Property.
 - b. Within 10 days of the Order, implement temporary erosion control measures on the Property.
 - c. Within 30 days of the Order, submit a restoration plan to show removal of fill placed in wetland or surface waters as identified in findings 26 and 27. Include in the plan:
 - 1) Restoration of approximately 12,425 sq. ft. of impacted wetlands.
 - 2) The stamped survey plan of existing conditions at the Property, including culverts, roads, buildings, stone walls, and limits of site development,
 - 3) A current wetlands delineation stamped by a wetlands scientist or certified soil scientist;
 - 4) A delineation of jurisdictional areas (surface waters) that were filled and dredged on the Property since 1978, including delineation of the historic location of the wetlands or stream channels;
 - 5) A construction sequence to carry out removal of the fill and restoration of the Property; and
 - 6) A planting plan to restore the wetlands and surface waters to their prior condition.
 - d. Implement the plan upon approval by DES in accordance with the DES schedule and required conditions.
4. On October 18, 2000, DES received a letter from Mr. Kimball as a follow-up to his conversation with DES personnel. The October 18, 2000 letter indicated what he understood to be a tentative agreement regarding the Order.
5. As a response to the October 18, 2000 letter, DES sent a letter dated November 17, 2000 stating that Mr. Kimball's letter did not accurately reflect the tentative agreement in that it failed to include areas previously proposed for restoration on an earlier unstamped plan. DES granted Mr. Kimball a time extension for compliance with the Order (not for appeal of the Order) until December 30, 2000.
6. To date the required plans have not been received by DES.
7. RSA 482-A:6 provides that DES may issue an order to any person in violation of the chapter, a rule adopted under the chapter or any condition in a permit issued under this chapter to comply with the chapter, the rule or the permit, and require such remedial measures as may be necessary.
8. In 1999, the Division sought a fine of \$2,000 against Mr. Kimball for work performed without a permit at 55 Mill Street in Wolfeboro, NH (AF 99-073). The Commissioner of DES imposed the fine after a hearing and, in response to Mr. Kimball's Motion for Reconsideration, reaffirmed a \$2,000 fine and notified Mr. Kimball that the fine was to be paid within 30 days of that decision.
9. To date, DES has not received payment for the \$2,000 fine due.

VI. Violations Alleged

1. Paul Kimball has violated RSA 482-A:14 by failing to comply with Administrative Order WD 00-63.

V. Proposed Administrative Fines

1. For the violation identified in IV.1, above, Env-C 614.06 specifies a fine of \$2,000.

The total fine being sought is \$2,000.

VI. Hearing, Required Response

You have the right to a hearing to contest the Division's allegations before the fine is imposed. A hearing on this matter has been scheduled for **Monday, July 30, 2001 at 9:00 a.m. in Room C-110** of the DES offices at 6 Hazen Drive in Concord, NH. **Pursuant to Env-C 601.06, you are required to respond to this notice. Please respond no later than June 29, 2001**, using the enclosed colored form as follows:

1. If you plan to attend the hearing, please sign the appearance (upper portion) and return it to James Ballentine, DES Enforcement Paralegal, as noted on the form.
2. If you choose to waive the hearing and pay the proposed fine, please sign the waiver (lower portion) and return it **with payment of the fine** to Mr. Ballentine.
3. If you wish to discuss the possibility of settling the case, please sign the appearance and return it to Mr. Ballentine **and** call Mr. Ballentine to indicate your interest in settling.

You are not required to be represented by an attorney. If you choose to be represented by an attorney, the attorney must file an appearance and, if a hearing is held, submit proposed findings of fact to the person conducting the hearing.

If you wish to have a hearing but are unable to attend as scheduled, you must notify Mr. Ballentine at least one week in advance of the hearing and request that the hearing be rescheduled. If you do not notify Mr. Ballentine in advance and do not attend the hearing, the hearing will be conducted in your absence in accordance with Env-C 204.09.

VII. Determination of Liability for Administrative Fines

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that you committed the violations alleged and that the total amount of fines sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that you committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

- * Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that you prove, by a preponderance of the evidence**, applies in this case:
1. The violation was a one-time or non-continuing violation, **and** you did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** you did not benefit financially, whether directly or indirectly, from the violation.
 2. At the time the violation was committed, you were making a good faith effort to comply with the requirement that was violated.
 3. You have no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
 4. Other information exists which is favorable to your case which was not known to the Division at the time the fine was proposed.


*******IMPORTANT NOTICE*******

The hearing that has been scheduled is a formal hearing. The hearing will be tape recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that you committed the violation(s) alleged above and that the fine(s) should be imposed.

The hearing is your opportunity to present testimony and evidence that you did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced. If you have any evidence, such as photographs, business records or other documents, that you believe show that you did not commit the violation(s) or that otherwise support your position, you should bring the evidence to the hearing. You may also bring witnesses (other people) to the hearing to testify on your behalf.

If you wish to have an informal meeting to discuss the issues, you must contact Mr. Ballentine at (603) 271-6072 to request a prehearing conference.

Information regarding this proposed fine may be made available to the public via the DES Web page (www.state.nh.us.des). If you have any questions about this matter, please contact James Ballentine, DES Enforcement Paralegal, at (603) 271-6072.

COPY

Harry T. Stewart, P.E., Director
Water Division

Enclosure (*NHDES Fact Sheet #CO-2 2000*)

cc: Gretchen Rule, DES Enforcement Coordinator
Susan Alexant, DES Hearings and Rules Attorney
Harry T. Stewart, P.E., Director
Marjory Swope, NHACC
Michael Walls, DOJ/EPB
Wolfeboro Conservation Commission
Wolfeboro Board of Selectmen

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APPEARANCE

_____ I will attend the hearing scheduled for **Monday, July 30, 2001 at 9:00 a.m.** in Room C-110 of the
DES offices at 6 Hazen Drive in Concord, NH.

Signature

Date

Name (please print or type): _____

Title: _____

WAIVER OF HEARING

_____ I certify that I understand my right to a hearing regarding the imposition of the proposed
administrative fine and that I hereby waive those rights. The fine payment in the amount of \$2,000
paid to Treasurer, State of New Hampshire is enclosed.*

** If you pay by check, draft, or money order that is returned due to insufficient funds, pursuant to
NH RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the original
check draft, or money order or \$25.00, whichever is greater, plus all protest and bank fees, in
addition to collecting the amount of the original check draft, or money order.*

Signature

Date

Name (please print or type): _____

Title: _____

RETURN THIS PAGE ONLY TO:

James Ballentine, DES Enforcement Paralegal
Department of Environmental Services
6 Hazen Drive
P.O. Box 95
Concord, NH 03302-0095